

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON SALEM DIVISION

ENTERED

JUN 11 2002

U.S. Bankruptcy Court
Winston-Salem, NC

TRD

IN RE:

Donald Keith Gallimore

Debtor.

Case No. 00-52225 C7

Rebecca Mae Fallin

Plaintiff,

vs.

Donald Keith Gallimore

Defendant.

Ad. Proc. No. 01-6003 ✓

ORDER

THIS MATTER came on before the Court, after due and proper notice, upon the Complaint of Rebecca Mae Fallin ("Plaintiff"), the ex-wife of the Debtor and Defendant Donald Keith Gallimore ("Debtor/Defendant"), filed on February 5, 2001, seeking an order of the Court determining that certain debts incurred in the divorce and marital property distribution of the parties are excepted from discharge pursuant to 11 U.S.C. § 523(a)(15). Appearing before the Court was John Meadows and Gordon Brown as counsel for the Plaintiff. The Debtor/Defendant was pro se and did not appear at the trial.

The Court, after receiving the testimony, considering all the exhibits and the entire official file, makes the following Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

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FINDINGS OF FACT

1. This is a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. § 157(a), (b) (1), and (b) (2) and 11 U.S.C. § 523.

2. The parties were lawfully married on September 1, 1978. There were no children born to the union of the marriage.

3. The parties separated on April 14, 1999 without the benefit of a written Separation Agreement and Property Settlement.

4. The parties were divorced on June 21, 2000 and each party filed pleadings seeking the equitable distribution of marital property. An equitable distribution hearing was conducted before the Honorable Victoria L. Roemer, District Court Judge and an Equitable Distribution Judgment was entered by Judge Roemer on August 9, 2000, nunc pro tunc, July 14, 2000. Pursuant to the terms of that Order, the Debtor/Defendant was to, among other things, pay to the Plaintiff the sum of \$9,291.44 as a distributive award pursuant to N.C.G.S. § 50-20.

5. The Debtor/Defendant has failed to comply with the terms of the Equitable Distribution Judgment which has become a Final Order.

6. On November 3, 2000, the Debtor/Defendant filed a voluntary petition for relief under Chapter 7 of the United States Bankruptcy Code.

7. The Plaintiff timely filed an adversary proceeding in the Bankruptcy Case, contending that the debt should not be discharged pursuant to 11 U.S.C. § 523 (a)(15). The Plaintiff also filed a complaint under § 523(a)(2) and (a)(5) but is no longer pursuing those claims.

8. The Plaintiff is presently not employed but has previously been employed as a private duty nurse. Due to a pelvic injury, she is not able to work at the present time. Her only source of income is from social security from which she receives \$1,086.00 per month. Her monthly living

expenses exceed this amount, and friends and family members are helping her pay her current bills which include the sum of \$200.00 per month for medication.

9. At the time the Debtor/Defendant filed his Chapter 7 petition, he showed assets of \$19,313.00 and liabilities of \$38,399.00. The Debtor/Defendant has admitted that within one year of the filing of the petition, he gave the sum of \$22,000 to his son and gave an additional sum of money of approximately \$16,000 to his daughter.

CONCLUSIONS OF LAW

The Bankruptcy code is intended to provide an honest debtor with a fresh start. There are, however, several types of debts that cannot be discharged in a bankruptcy proceeding. 11 U.S.C. § 523 sets out the exceptions to discharge and § 523(a)(15) provides an exception to discharge of a debt "that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record unless -

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. . . or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor."

The Plaintiff has established that the debt is not for alimony, support or maintenance but is one incurred in the course of a divorce or separation or in connection with a separation agreement or divorce decree. "Upon such a showing, the debt is excepted from discharge unless the debtor is able to establish either of the two exceptions, subpart (A), the ability to pay test, or (B) the detriment test." Williams v. Williams 271 B.R. 449, 454 (Bankr. N.D.N.Y. 2001) (quoting In re Crosswhite, 148 F.3d 879, 881. (7th Cir. 1998)). See also In re Leonard, 231 B.R.

884, 887 (E.D. Pa. 1999); In re Koons, 206 B.R. 768, 772 (Bankr. E.D. Pa. 1997); In re Hill, 184 B.R. 750, 753-54 (Bankr. N.D. Ill. 1995).

Once the plaintiff has met her initial burden of proving that this debt was incurred by the debtor in the course of a divorce or separation and is not alimony or support, the burden switches to the debtor to prove an inability to pay or to prove that making the debtor pay would be to his detriment. In this case, the Debtor/Defendant did not appear and did not submit any evidence for the Court to consider. In as much as the Plaintiff has met her burden and the Debtor/Defendant has failed to meet his burden, this Court finds that the Equitable Distribution Judgment in the amount of \$9,291.44 is non-dischargeable pursuant to 11 U.S.C. § 523 (a)(15).

This is the 11 day of June, 2002 .

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge